

# THE APPEAL IS OVER...WHAT HAPPENS WITH THE APPEAL BOND?

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Your client secured an appeal bond to stay enforcement of a money judgement during their appeal. The appeal is over...now what happens to the appeal bond? As you can imagine, it depends largely on how the appeal was concluded. This article seeks to address the most common circumstances and questions arising from appeal bonds that we encounter as bonding professionals.

We'll begin by setting the stage and describe briefly what the appeal bond does. The purpose of the bond is to protect both parties while execution of the judgment is stayed. This purpose is achieved in two ways. First, the appellant is protected because it doesn't have to pay up front a judgment that could be reversed, which would then require an attempt to recover any up-front monies paid. The appellee, as judgment creditor, is protected because the bond ensures that if the judgment is upheld on appeal, there are funds available to fully satisfy the judgment. The bond prevents the appellant from filing an appeal solely or primarily with the purpose of buying time to render itself judgment-proof. The bond protects each party's rights relating to the underlying judgment. Which is why the most definitive element of addressing the closure of an appeal bond is how the appeal itself concluded.

## IF THE APPELLANT LOSES

What happens if the appellant loses on appeal and needs to pay?

While the statutes establishing appeal bonds for state and federal courts have distinct and individual language, the conditions of appeal or supersedeas bonds universally reflect the purpose of the bond – to ensure that neither party suffers injury as a result of appeal. The conditions therefore contemplate 4 scenarios:

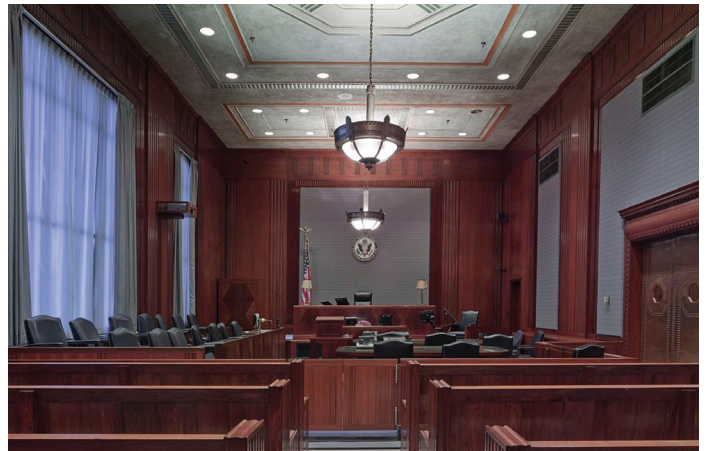
(1) The appeal is dropped. If this occurs, liability

under the bond is triggered, because the underlying judgment remains in place and the stay is no longer in effect. Once the judgment creditor can resume collections, it can make a claim against the bond.

(2) The appeal is wholly unsuccessful and the judgment is affirmed. In this instance, liability under the bond would obviously be triggered, and once such decision is final, the bond obligee (typically the judgment creditor) can make a claim against the bond.

(3) The appeal is wholly successful, and the judgment is reversed in its entirety. In this instance, the appeal bond can be closed once such appellate decision is final.

(4) The appeal is partially successful. It is either partially reversed, or reversed and remanded. These scenarios are case specific, so there is no general guideline. Typically, a court order will be required to exonerate the bond or find liability under the bond.



When a bond principal does not prevail on appeal, it will typically either: (1) notify the Surety of that fact and indicate whether it intends to pay the judgment independently and then seek to establish proof of payment in order to obtain an exoneration of the bond; or (2) it will request that the Surety pay out on the bond. It is important to note that the primary obligation of payment remains with the Judgment debtor. However, the judgment creditor will often reach out to the Surety directly with a demand for payment. If such a claim is received, the Surety will typically reach out to the bond

principal (i.e. appellant) to verify the claim and ascertain if it is payable as represented by the judgment creditor. The Surety will seek to determine whether the judgment creditor intends to pay directly, through the bond, or to appeal further, as well as to verify the amount that may be due.

There are, of course, situations where the appellate decision will not be immediately final. If there is any further dispute regarding the appellate decision, such as around the calculation of the judgment amount, there is likely to be motion practice addressing such a dispute which would delay the determination of finality on the appellate decision. Similarly, the aggrieved party can seek to appeal the appellate decision to a higher court, either following unsuccessful motion practice at the appellate level or immediately upon receipt of its decision, as permitted by the applicable rules of court. In such case, again, the appellate decision is not final and therefore any claim against the bond would have to be pending until the higher court issued a ruling or denied review.

### **What duty does the surety owe both parties when evaluating a claim?**

The obligations of a Surety are determined by the applicable state statutes controlling the surety insurance industry as set forth by the relevant state Department of Insurance (“DOI”). Any further obligations are determined by the terms of the Surety’s contracts and bonds. Apart from the general duties applicable to insurance companies under DOI regulations, the duties owed by the Surety to the obligee are delineated in the bond, which is often either a direct quote or paraphrase of the state or federal appeal bond statutory language. While the duty is therefore state or court specific, it generally involves paying such claims as are determined to be legitimately payable in accordance with the time and response requirements delineated in the state insurance codes. The obligations of the Surety to its principal are similarly controlled by the relevant insurance code, with the standard duties of good faith, care and communication being obviously relevant in a claims situation. Beyond that, the relationship of the Surety and its principal are controlled by the contractual agreements between them. There is usually an indemnity agreement and often a collateral security agreement that controls their relationship and establishes under what circumstances the Surety can either request the deposit of collateral or trigger indemnification, or utilize any collateral security that may have been deposited with it.

### **IF THE APPELLANT PREVAILS**

If the appellant prevails on appeal, what do they need to do in order to release the bond?

The simple answer is: establish definitively that no liability can be argued against the bond. This is simple when the appellate decision reverses the underlying judgment in its entirety. Proof of the finality of such a decision cuts off the bond conditions and renders it obsolete. That is not the case where the decision is only partially reversed, or remanded for some additional review where it may still be confirmed by the lower court. For example, if a judgment on liability is affirmed but the calculation of damages is remanded for further review, it is arguable that even if the damages calculation changes on remand the bond still provides coverage for the amended judgment issued because the liability portion covered by the bond was affirmed. In these situations, it can be argued that the bond provides coverage for any portion of the judgment that was not reversed, or for the entire judgment if, upon subsequent review on remand by the trial court, the original decision is deemed to have been correct or any change made upon remand is deemed incidental to any affirmed portion of the judgment. As such, though the appellant may rightfully argue that they partially prevailed, they would need to obtain a court order from the court to which the matter was remanded, exonerating the bond and discharging the Surety, thereby establishing definitively that such court will not find liability against the bond after its deliberation on remand. The key is to prove to the Surety that its exposure under the bond is definitively concluded under the law.

### **IF THE PARTIES SETTLE**

What are some things attorneys and their clients should keep in mind if they settle a case?

Don’t forget the bond when you’re drafting your settlement language! Bear in mind that the bond is tied to the Judgment. As long as the Judgment remains open with the Court, a claim could be made against the bond. Perhaps such claim would be defensible, but no Surety is actively looking to engage in a court battle over a settlement agreement it wasn’t even a party to. The Surety will want to make sure that a Satisfaction of Judgment was filed precluding recovery against the judgment it bonded before deeming its bond exonerated. This is of greater importance when a settlement is conditional, as they often are. The recorded, court-stamped Satisfaction of Judgment is typically the document that establishes that the conditions of the settlement have been satisfied. If there is something else that establishes that fact, the Surety may request to see that. Furthermore, asking the Surety to rely on a redacted settlement agreement where the conditions are obscured will not work. If there are conditions that are not met, the settlement could be voided and the judgment remain actionable,

which means a claim could still be made against the bond. The Surety must have the ability to identify the conditions of the settlement and establish that they have been satisfied in order to conclude that the Judgment in question is, in fact, moot and their bond obsolete. The best way to handle the matter is to incorporate into the settlement agreement itself unequivocal and unconditional language exonerating the bond. Language that exonerates the bond immediately and unconditionally, irrespective of any other conditions that may be set forth in that settlement agreement or elsewhere, can function as a release if signed by the obligee. Most sureties will have their own sample language for this purpose, so if you're drafting a settlement agreement, or even a stipulation or court order following settlement, the best idea is to reach out to the Surety and find out what language they will need to see in order to exonerate the bond.

## **RELEASE OF COLLATERAL IF APPELLANT PREVAILS**

If the appellant does not prevail, collateral could be used to pay the judgment. But what if the appellant prevails? What is the process for getting the collateral back and how long does it normally take?

Any collateral held by the Surety is held for the purpose of protecting against liability incurred as a result of issuance of the bond. Consequently, the same rules apply to release of collateral as would apply to obtaining closure and exoneration of the bond. The bond principal must establish that the purpose of the bond has either been satisfied or rendered obsolete. As discussed, this can be done in a variety of ways including: (1) the Judgment for which the bond was filed has been fully paid and satisfied; or (2) the Judgment was reversed in its entirety and with finality; or (3) the bond obligation has been released by the obligee; or (4) the bond has been exonerated by a final Court order. With evidence that the bond obligation is legally concluded, the Surety can close out the bond file and return the collateral. Of course, the terms under which collateral is held are subject to the collateral security agreement entered into with the Surety, which may have other terms and conditions. One such common condition, for example, is that the collateral is held to cover any unpaid bond premium. So, the Surety may refuse to release the collateral until the bond principal has paid any unpaid bond premium owed through the date of exoneration or has authorized the deduction of the premium from such collateral. The time-consuming part of

obtaining return of collateral is typically establishing that the bond itself is exonerated. There is no way to quantify the time involved in that aspect of collateral release, because it obviously depends very much on the specific facts of the case and how easy it is to establish that liability has legally concluded. The more complex the legal landscape is, the longer it is likely to take. However, once it has been determined that the bond is exonerated, it becomes merely a question of ensuring compliance with internal and/or federal guidelines to ensure the funds are being returned to their proper owner at a current address. That typically doesn't take long at all, though of course each Surety has its own individual procedures.

## **CONCLUSION**

As the reader can see from the foregoing discussion, the manner and timeframe in which the liability under an appeal bond is extinguished and any associated collateral can be released is in large part determined by how the appeal is finalized and the steps taken by the appellant and their attorney to provide the surety with the information required.

As with the cases themselves, every situation is different and must be addressed within the context of the circumstances. This is where the expertise and guidance provided by an agent and surety company that are well versed in appeal bonds can be invaluable to attorneys and their clients.

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